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In the

Supreme Court of the United States

October Term, 1973

No. 73-759

HON. EDWIN EDWARDS, et al.,

Appellants,

—v.—

MARSHA B. HEALY, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

BRIEF OF THE AMERICAN BAR ASSOCIATION, *AMICUS CURIAE*

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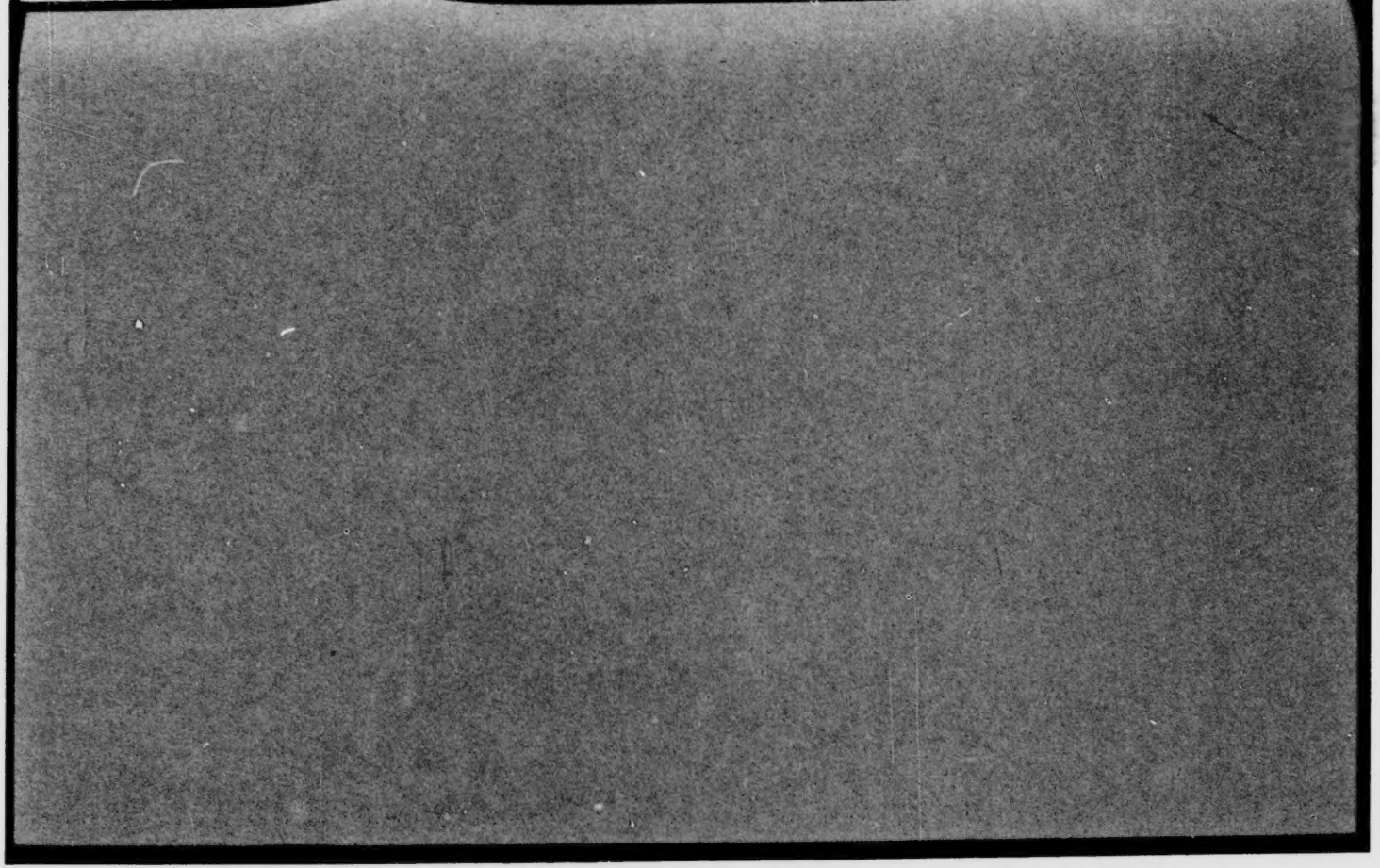

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BRIEF OF THE AMERICAN BAR ASSOCIATION, *AMICUS CURIAE*

INTEREST OF *AMICUS*

The American Bar Association, the largest national professional organization of attorneys, has more than 155,000 members from all of the fifty states.

The Association has taken a strong stand on behalf of equal rights for women, stating in a resolution adopted by the House of Delegates in 1972,

> "RESOLVED, that the American Bar Association supports constitutional equality for women, and urges the extension of legal rights, privileges and responsibilities to all persons, regardless of sex."

Moreover, the Association has traditionally had a keen interest in the administration of justice in the United States. It has taken the position that all litigants are entitled to a jury which represents a cross section of the community and, concomitantly, that all citizens have a right to be eligible for, and a duty to perform, jury service. The Association's concerns are reflected in 1967 resolutions supporting legislation designed to ensure these objectives:

> "RESOLVED, that the American Bar Association approves and endorses legislation to provide for the random selection of jurors and to prohibit discrimination on account of race, color, religion, sex, national origin, or economic status in the selection of grand or petit jurors in the United States courts such as S. 989 90th Cong. entitled 'Jury Selection and Service Act of 1967.'"
>
> "RESOLVED, that the American Bar Association approves in principle a bill proposed by the Judicial Conference of the United States to prohibit discrimination on account of race, color, religion, sex, national origin or economic status in the selection of grand or petit jurors in any state court."

The Association, in light of its deep commitment to the fair and impartial administration of justice and its opposition to discrimination against underrepresented groups in our society, feels that it can make a significant contribution to the full consideration of a question which bears significantly on the rights of women and on the system of jury service.[1]

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[1] The Association has filed with the Clerk of the Court letters from counsel for both parties consenting to the submission of this *amicus curiae* brief.

SUMMARY OF ARGUMENT

Louisiana provides by constitution and statutes that women may serve on juries only by filing a written declaration of their desire to do so. This Court is being asked to determine whether a three-judge United States District Court was correct in its finding that these provisions violate the Equal Protection Clause of the Fourteenth Amendment—a finding which expressly recognized that *Hoyt* v. *Florida*, in which this Court upheld a similar Florida statute, has been *sub silentio* overruled by later Supreme Court cases. This case presents an opportunity for the Court to reconsider a line of cases culminating in *Hoyt* v. *Florida*, which were grounded on invalid, outmoded conceptions of the role of women in society.

The judgment of the court below was correct. Any classication based on sex should be considered suspect and subjected to an exacting test to determine whether it contravenes the Equal Protection Clause. To support such a suspect classication, there must be a showing of a compelling state interest and a finding that the use of the classification is necessary to fulfill that interest.

Moreover, the provisions of Louisiana law constitute deprivations of fundamental rights in violation of the Due Process and Equal Protection Clauses of the Constitution by denying to litigants juries representing a cross-section of the community and by restricting women's eligibility for jury service.

ARGUMENT

I.

Louisiana's Classification Based on Sex Is Not Required by a Compelling State Interest and Therefore Denies to Women the Equal Protection of the Laws.

Louisiana provides by statutes[2] and by its constitution[3] that women may serve on juries only if they file a written declaration of their wish to do so. There is no similar limitation placed on jury service by men. As a result, in the jurisdiction in which the case was brought below, women have never exceeded five percent of any jury panel[4] and, concomitantly, men have borne the overwhelming burden of jury service.

These provisions were successfully challenged in class actions for declaratory and injunctive relief brought by classes consisting of women who argued that they are unfairly deprived of the right to serve on juries by these provisions, men who argued that these provisions impose on them an unfair burden of jury service, and litigants who

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[2] La. Rev. Stat. §13:3055 (civil juries): "A woman shall not be selected for jury service unless she has previously filed with the clerk of court of the parish in which she resides a written declaration of her desire to be subject to jury service."

* * * * *

The Louisiana Code of Criminal Procedure, art. 402, has identical language.

[3] La. Const. art. VII, §41, which provides in pertinent part: "[N]o woman shall be drawn for jury service unless she shall have previously filed with the clerk . . . a written declaration of her desire to be subject to such service."

[4] Stipulation of facts.

argued that they are deprived of juries representing a cross-section of the community. Louisiana apparently seeks to justify the provisions on the assumption that the care of young children would be otherwise jeopardized and that this constitutes a compelling state interest. Appellants' Brief, pages 6-7.

This Court should invalidate Louisiana's statutory scheme by finding that sex is a constitutionally suspect classification, impermissible under the Equal Protection Clause of the Fourteenth Amendment unless the state meets the burden of showing that the classification is required by a compelling state interest,[5] a burden which Louisiana clearly has not met.[6] Sex, like race, is an acci-

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[5] This Court has subjected statutes under the Equal Protection Clause to "strict scrutiny" if the statutory scheme is based on an inherently "suspect classification"—race, *e.g.*, McLaughlin v. Florida, 379 U.S. 184 (1964); nationality, *e.g.*, Korematsu v. United States, 323 U.S. 214 (1944); or alienage, *e.g.*, Graham v. Richardson, 403 U.S. 365 (1971)—or if the statute involves a "fundamental interest," such as voting, *e.g.*, Harper v. Virginia Bd., 383 U.S. 663 (1966); interstate travel, *e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969); criminal appellate due process, *e.g.*, Griffin v. Illinois, 351 U.S. 12 (1956); or procreation, *e.g.*, Skinner v. Oklahoma, *ex rel.* Williamson, 316 U.S. 535 (1942).

If a statute merits strict scrutiny, the state bears the burden of proving that the classification is necessary to meet a "compelling state interest"—a burden seldom met. See, *e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972); Graham v. Richardson, 403 U.S. at 375; McLaughlin v. Florida, 379 U.S. 184 (1964). *But see* Storer v. Brown, 42 U.S.L. Wk. 4440 (1974).

If neither a fundamental interest nor a suspect classification is involved, there is a presumption of constitutionality rebuttable only if the parties objecting to the statute can show that it is not rationally related to a legitimate state interest. Parties seldom can meet this burden. See, *e.g.*, Allied Stores Inc. v. Bowers, 358 U.S. 522 (1955). *But see* Reed v. Reed, 404 U.S. 71 (1971).

[6] Louisiana's legitimate state interest in providing for young children could be fully met by providing exemptions from jury service for all *persons* who are responsible for the care of young children; a classification by sex is obviously unnecessarily (and stereotypically) overbroad.

dent of birth; moreover, it is a highly visible characteristic. Women—solely because of their sex—have historically been and continue to be victims of discrimination in our society.[7]

Statutes based on stereotypic assumptions of the nature and appropriate role of women, like those before the Court in this case, abound.[8] Case law grounded on the same conceptions of women's natural place as mother and homemaker is still cited as controlling precedent to justify restricting women's rights or increasing their obligations as compared with men.[9]

Women, like blacks and aliens, need the protection afforded by the suspect classification test. Women represent approximately fifty percent of the population. Thus, the myriad of laws which irrationally use a sex classification have the impact of depriving one-half of the population of its Constitutionally protected right to equality under law. These persons should not have to wait for a successful full-scale court challenge to each and every such law in order to attain first-class citizenship. Further, the pervasive discrimination against women in economic, educational and political spheres[10] handicaps them in vindication of

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[7] See generally, Kanowitz, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION (1969)

[8] See, *e.g.*, Citizens' Advisory Council on the Status of Women, *Memorandum* (March 1970), 116 Cong. Rec. E2588 (daily ed. Mar. 26, 1970), for a list of fifteen areas of statutory sex discrimination.

[9] See Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U.L. REV. 675 (1971), and cases cited therein.

[10] See generally, President's Task Force on Women's Rights and Responsibilities, A MATTER OF SIMPLE JUSTICE (1970).

their rights: as a group they are ill-equipped to sustain protracted court actions challenging discriminatory laws.

Whether a court should designate a classification as suspect is basically a question of fact. The court must decide whether use of the particular classification is generally so irrational that the classification does not warrant the usual presumption of reasonableness. This decision should be made on the basis of the Court's experience with various uses of the classification and on a consideration of whether the classification is likely to be used rationally. When a court decides that the classification is usually unreasonable, it should establish a rebuttable presumption of irrationality by holding that the classification is suspect. Failure to do so constitutes a finding of fact—whether express or implied—that the classification is generally reasonable and establishes a presumption of validity.

Classifications based on sex are almost invariably irrational. There is no relationship between a person's sex and his or her potential contributions to society, needs or abilities. No longer can such classifications be supported by notions of separate social roles for the sexes. Such a classification may have a reasonable basis only on the rare occasions when a sex classification is compelled because of the physiological differences between the sexes, when such classification is necessary to preserve individuals' rights of privacy, or when the state can prove some other compelling interest such as remedying past discrimination.[11]

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[11] See generally, Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 888-909 (1971). The Equal Employment Opportunity Commission has recognized that sex may be a bona fide occupational qualification in some limited circumstances under title VII of the Civil Rights Act of 1964—for example, where re-

With respect to such a classification, the usual constitutional presumption of rationality is no longer meaningful or valid. Rather than continuing to require the persons challenging sex classifications repeatedly to prove irrationality, this Court should now shift the burden to the state to establish a compelling interest requiring the use of such classification.

An example of precedent still cited to show that classification on the basis of sex is rational and permissible is *Hoyt* v. *Florida*, 368 U.S. 57 (1961), in which this Court upheld a statutory scheme virtually identical to the Louisiana provisions presently before the Court. *Hoyt* is the culmination of a line of cases decided by this Court which are grounded on outmoded and unsupportable attitudes toward the role of women.

In *Bradwell* v. *Illinois*, 83 U.S. (16 Wall.) 130 (1873), an early ancestor of *Hoyt*, the appellant had been denied admission to the bar solely because of her sex. Three of the seven-member majority of this Court stated their rationale for upholding the state action in a concurring opinion as follows:

> "[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance,

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quired for authenticity as in the case of an actor or actress. EEOC, Guidelines on Discrimination Because of Sex, 29 C.F.R. §1604.2. Congress seems to have recognized the need to protect privacy rights in Section 907 of title IX of the Education Amendments of 1972, Pub. L. 92-318, June 23, 1972, 86 Stat. 235.

as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States. . . .

"It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases. . . .

"[I]n view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex." *Id.* at 141-42.

Similar conceptions of women's limited place in a man's world underlie the landmark decision upholding protective labor legislation for women, *Muller* v. *Oregon*, 208 U.S. 412 (1908):

"That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. . . .

"Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. Education was long denied her, and while now the doors of the school room are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. . . .

"It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. . . .

"The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of

> vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her." *Id.* at 421-23.

In *Goesaert* v. *Cleary*, 335 U.S. 464 (1948), a state statute limiting bartending by women to wives and daughters of male tavern owners was upheld, this Court finding sufficient justification in its speculation that "bartending by women may, in the allowable legislative judgment, give rise to moral and social problems . . . . " *Id.* at 466.

Hoyt is grounded on the same stereotype of the nature and social role of women and the same assumption that classification on the basis of sex raises no serious equal protection problems:

> "Despite the enlightened emancipation of women from restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities." 368 U.S. at 61-62.
>
> "There is [not] present here . . . the unfortunate atmosphere of ethnic or racial prejudices . . . ." *Id.* at 68.

The *Hoyt* presumption that administrative convenience and social role can support a statute which classifies by

sex was rejected by this Court in *Reed* v. *Reed*, 404 U.S. 71 (1971), and in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973). By rejecting such justifications, these decisions eliminated the rationale of the *Hoyt* decision. The three-judge Federal District Court below properly treated *Hoyt* as *sub silentio* overruled.

In *Reed* an Idaho statute providing that males must be preferred in selecting the administrator of an estate was held to violate the Equal Protection Clause of the Fourteenth Amendment. The Court found that administrative convenience was insufficient to permit a classification by sex:

> "Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy . . . . To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment . . . ." 404 U.S. at 76.

In *Frontiero* this Court held unconstitutional a federal statute which distinguished on the basis of sex in determining eligibility for certain military dependents' benefits. Four justices adopted the course presently urged by *amicus*, holding that classification by sex is inherently suspect and requires "close judicial scrutiny." Their reasons were well articulated: the "long and unfortunate history of sex discrimination," the existence of statutes based on "gross, stereotypical distinctions between the sexes," the fact that sex "is an immutable characteristic determined solely by the accident of birth," and the fact that "women still face pervasive . . . discrimination" in this country. 411 U.S. at 684-87.

Mr. Justice Stewart in *Frontiero* preferred to describe the statutes as working "an invidious discrimination in violation of the Constitution." 411 U.S. at 691. As stated above, it is difficult to conceive of a statute classifying on the basis of sex which does *not* "work an invidious discrimination" except provisions required by biological differences, individual rights of privacy, or the need for affirmative aid to remedy prior discrimination, in which cases a "compelling state interest" might be found.

Three justices in *Frontiero* grounded their finding that the challenged statutes violate equal protection concepts of the Fifth Amendment Due Process Clause[12] on *Reed*'s rejection of the administrative convenience test, deferring any application of suspect status to sex classification in part because the Equal Rights Amendment is before the states for ratification. This Court should not further postpone its consideration of whether sex is a suspect classification. Whatever the political reaction to the proposed Equal Rights Amendment may be, this Court has an obligation to consider and decide whether sex classifications are so inherently unreasonable that they must be presumed to be so judicially. Distinguished opponents of the Equal Rights Amendment have argued against its ratification on the grounds that this Court must be expected to eliminate laws which discriminate on the basis of sex through the Equal Protection Clause—a goal which cannot be fully realized unless sex is held to be a suspect classification. *E.g.*, Hearings on S. J. Res. 61 & S. J. Res. 231 Before the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. 74

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[12] There is no Equal Protection Clause in the Fifth Amendment, but equal protection concepts inhere in its Due Process clause. Bolling v. Sharpe, 374 U.S. 497 (1954).

(1970) (testimony of Harvard Law School Professor Paul Freund).

This Court's recent decision in *Kahn* v. *Shevin*, 42 U.S. L.Wk. 4591 (1974), does not preclude holding that sex is a suspect classification. In *Kahn* this Court upheld a statute conferring a tax benefit on widows, recognizing the broad legislative discretion permitted in connection with tax legislation. The Court found that the state purpose supporting the exemption was to remedy the effects of past discrimination against women. Such a state purpose —to offer affirmative aid to an oppressed group—may well present a compelling state interest necessitating the use of the suspect classification.[13]

An analysis of the present case, whether based on a strict scrutiny test or a rational relationship test, requires that *Hoyt* be overruled and that the Louisiana law be held unconstitutional. Louisiana has failed to show, not only a compelling state interest necessitating the classification, but also any rational relationship between the classification and a legitimate state interest. In essence its claim is merely one of administrative convenience.

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[13] If Kahn v. Shevin instead were interpreted to permit a state to treat women as a group differently from men because of their traditionally different roles, then it would constitute an erroneous continuation of the line of cases ending with Hoyt v. Florida. Nonetheless, it would still be distinguishable from the present case. In Kahn there appeared a disparity in the earnings of women and men affording a rational basis for the classification and as this disparity was attributable to prior discrimination a compelling state interest. However, in Reed, no disparity in the capacity and integrity required to administer an estate appears, and in Frontiero, no disparity in the actual earnings to justify a denial of a dependency allowance appears. In the case at bar, there is no disparity in the capacity to understand evidence and reach a rational verdict thereon.

In holding the law unconstitutional, this Court should find that the time has come to abandon the presumption that classifications based on sex are rational and constitutionally valid. This Court should renounce the concept that women may be treated differently from men under law on the basis that women may properly be relegated to certain narrow roles in our society. This Court should find, as stated in the American Bar Association's resolution, that the time has come for "constitutional equality for women, and . . . the extension of legal rights, privileges and responsibilities to all persons, regardless of sex." To establish such equality under law, this Court must hold that sex is a suspect classification.

II.

Louisiana's Statutory Scheme Violates the Equal Protection Clause and the Due Process Clause by Depriving Litigants of the Fundamental Right to Juries Representing a Cross-Section of the Community and by Limiting Women's Fundamental Rights of Jury Service.

In addition, the provisions of Louisiana law before the Court must be stricken for a second reason: they impinge upon the free exercise of fundamental constitutional rights. Denials of fundamental rights which fail to meet the "compelling state interest" test are not constitutionally tolerated. See, *e.g., Shapiro* v. *Thompson,* 394 U.S. 618 (1969), and other cases cited in note 5, *supra.*

It is well-established that the right to a jury truly representative of the community is constitutionally mandated. It is implicitly recognized by the Sixth Amendment's guarantee of an impartial tribunal and is therefore required for

federal juries,[14] *Smith* v. *Texas*, 311 U.S. 128 (1940), and for state juries, *Duncan* v. *Louisiana*, 391 U.S. 145 (1968). Any statute which impinges on a litigant's right to a representative jury must be held to involve fundamental interests. *Cf. Peters* v. *Kiff*, 407 U.S. 493 (1972). Since clearly no all-male jury can represent a cross-section of the community, *Ballard* v. *United States*, 329 U.S. 187 (1946), Louisiana's provisions unjustifiably deprive litigants of a fundamental right.

Moreover, this Court has recognized that the right to serve on juries is also a fundamental right. *Peters* v. *Kiff*, 407 U.S. 493, 499 (1972). Jury service is the only opportunity most citizens have to participate in the judicial system and—second only to voting—is the most important involvement of the citizen in government decision-making. It is a basic political right which can be denied to any group only by a showing of strict necessity to meet an overriding state concern.[15] The provisions here in issue restrict women's opportunity to serve on juries to such an extent that ten percent or less of the women who would ordinarily be expected to serve actually do so.[16]

As indicated in part I of this brief, *supra*, Louisiana has failed to establish any compelling state interest requiring the denial of these fundamental rights. Therefore, the provisions violate the Equal Protection Clause. Further, they involve violations of the Due Process Clause, in that they arbitrarily deprive women and litigants of constitutionally protected rights.

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[14] *Cf.*, 28 U.S.C. §1862.

[15] Louisiana's systematic exclusion of women from jury service also unconstitutionally deprives men of the equal protection of the laws in forcing them to carry virtually the entire burden of jury service.

[16] Stipulation of facts.

CONCLUSION

For the above reasons, the American Bar Association respectfully urges this Court to affirm the decision of the three-judge United States District Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, MARGUERITE RAWALT, attorney for *amicus*, hereby certify that 3 copies of this brief were duly served upon attorneys for both parties by mail service, postage prepaid.

MARGUERITE RAWALT